

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Matthew Lewis

v.

Civil No. 10-cv-274-JL

Warden, New Hampshire State Prison

REPORT AND RECOMMENDATION

Petitioner Matthew Lewis has filed an amended petition for a writ of habeas corpus (doc. no. 6), asserting two claims alleging that his conviction was obtained in violation of his rights to due process and a fair trial, as guaranteed by the Fourteenth Amendment of the United States Constitution. Before the court is Respondent's motion for summary judgment (doc. no. 11) and Petitioner's response thereto (doc. no. 12). The district judge has referred the motion to this magistrate judge for a report and recommendation as to its disposition. See Rules 8(b) and 10 of the Rules Governing Section 2254 Cases in the United States District Courts ("§ 2254 Rules"); 28 U.S.C. § 636(b). For the reasons that follow, the court recommends that the motion for summary judgment (doc. no. 11) be granted and the petition (doc. no. 6) be denied.

Factual Background

Shortly before midnight on July 14, 2006, Eric Harris and Joseph Dawes walked by a house located at 153 East Main Street in Conway, New Hampshire. There were several individuals outside. A verbal exchange between Harris and Dawes, and the people standing outside the house, ensued. The exchange escalated into a fistfight. Harris was beaten up by Benjamin Blasi, receiving cuts and bruises, while Dawes fought with another individual.

Harris went home after the fight and contacted the Petitioner, Matthew Lewis, Lewis's girlfriend Rachel West, and Matthew French, a friend and roommate of Lewis and West. At approximately 1:30 a.m., the four embarked, in West's car, back to 153 East Main Street. Both Lewis and French were armed with handguns. Lewis loaded and cocked his gun at some point prior to reaching 153 East Main Street.

When the foursome arrived at 153 East Main Street, they got out of the car and yelled to the inhabitants, who were now inside, to come out. A woman, Megan O'Day, came out and she and West quickly got into a shoving match, which turned into a fistfight on the ground. Lewis was close to that fight. Lewis testified at trial that he was trying to break up the fight. Other witnesses, individuals who had also come out of 153 East

Main Street, testified that Lewis was kicking O'Day as West was beating her on the ground.

Blasi, who was very drunk, had, after the fight with Harris, passed out on a couch inside due to his intoxication. Blasi's friends roused him out of his sleep, with difficulty. At that time, Blasi had been sleeping for about an hour. During his trial testimony, Blasi described himself at that point as "belligerently drunk and sleeping."

Blasi eventually woke up and went outside in his shorts. Blasi was not carrying a weapon. Blasi saw an individual, who turned out to be Lewis, near the O'Day/West fight. Blasi approached Lewis, either running or walking very fast. Lewis fired his gun, shooting Blasi in the lower abdomen. Lewis testified he fired when Blasi was in the process of lunging at Lewis and swinging a punch. Blasi testified that he was eight to ten feet from Lewis when was shot.

After Lewis shot Blasi, Lewis panicked and grabbed West's hand and, along with Harris and French, fled from the scene. Because West had dropped her keys on the lawn, they ran, on foot, through nearby woods, back to Lewis, West, and French's apartment. Lewis was extremely upset and was crying and shaking uncontrollably. A friend, Brittany Ellis, came over. Lewis decided to turn himself into the police. Ellis accompanied

Lewis to the Conway Police Department where Lewis told the police he had shot someone earlier in the evening.

According to Lewis's interview with the police that night, which was essentially consistent with Lewis's testimony at trial, Lewis was trying to break up the fight between O'Day and West when he heard someone coming up fast behind him. Lewis turned to see Blasi lunging at him. Lewis, with his gun in his hand, put his arms up to protect himself from Blasi as Blasi dove at him. Lewis stated he shot the gun by accident when Blasi made contact with the gun. Lewis stated that he raised his hands in self-defense, and that he had not intended to shoot Blasi.

Moments after Blasi was shot, a New Hampshire state trooper on patrol drove by the residence and came to Blasi's aid. Blasi's friends were attempting to staunch the bleeding from the gunshot wound. An ambulance arrived and transported Blasi to the hospital. He was then flown to Maine Medical Center. Blasi had serious internal injuries which required a number of surgeries and other medical interventions to resolve. Blasi also had a burn mark on his skin that the emergency room doctor, Dr. Steven Johnson, testified was consistent with his skin touching the muzzle of a gun as the gun was fired. Dr. Johnson, testified he was not sure how close the gun was to Blasi when it was fired, as he is not an expert on that subject.

Due to Blasi's condition, the police did not interview him regarding the shooting until August 17, 2006, approximately one month after the incident. The interviewing police officer, Detective Alan Broyer, testified at trial that at the time of that interview, Blasi appeared to have a clear mind; did not appear to be under the influence of anything; and provided articulate, clear, appropriate, and quick answers to the officer's questions. Broyer testified that he would have stopped the interview had he had any doubt about Blasi's ability to communicate due to Blasi's medication, or for any other reason.

During the August 17, 2006, interview (hereinafter the "August interview"), Blasi told Broyer that he walked fast, but did not run, toward Lewis. Blasi also reported he did not see a gun. Blasi told Broyer that while attempting to swing at, or punch, Lewis, he felt a "jerk." He then remembered being on the ground and in pain, and then waking up in the hospital.

Lewis was charged with one count of second degree assault, for recklessly causing bodily harm to Lewis by means of a firearm, in violation of N.H. Rev. Stat. Ann. § 631:2, I(b). Lewis's three-day criminal trial began on Monday, May 21, 2007. On the preceding Friday, May 18, the prosecuting attorney, Sally Struble, met with Blasi to prepare his trial testimony. At that time, and during his testimony at trial, Blasi stated that as he

was approaching Lewis on the night of the shooting, he saw a gun in Lewis's hand, and saw Lewis's arm raised, pointing the gun, when Blasi was eight to ten feet away from Lewis.

At trial, Lewis's attorney, Howard Clayman, objected to the introduction of Blasi's testimony, as he had not been provided with any new written statement by Blasi or notice of any change in Blasi's testimony. Clayman argued to the court that he was entitled to be apprised of such a change "when it comes up," rather than during the testimony. Clayman, in arguing his objection, described the statement as a "key statement of the complaining witness," and "an extremely important statement," as it contradicted Blasi's prior statement, upon which Lewis had grounded his claim of self-defense. Struble argued that she did not take notes while preparing Blasi for trial, and that there was therefore no statement to provide. The objection was overruled.

Blasi testified at trial that he had not read the transcript of the August interview until the Friday before the trial began. Blasi further testified at trial that during the August interview, he was on an intravenous morphine drip, was taking ten doses of methadone daily, and was on three other narcotic medications for pain. Blasi testified that until he read the transcript of the August interview in May 2007, he did

not remember what he had told Broyer during that interview. At the time of his testimony, Blasi was not taking any medications.

During pretrial discovery in the criminal case, Lewis was provided with Blasi's medical records. A nurse's note in those records dated August 12, 2006, indicates that Blasi had been taken off morphine and placed on dilaudid and methadone on August 11, 2006. This discrepancy was not raised prior to or during trial by any witness in or party to the criminal case.

Procedural Background

Lewis's criminal trial began on May 21, 2007, and ended on May 24, 2007, with the jury's guilty verdict. Lewis was sentenced on October 17, 2007, to serve ten to twenty years in the New Hampshire State Prison, with two years of the minimum term suspended. Lewis filed a direct appeal of the conviction in the New Hampshire Supreme Court ("NHSC") on November 6, 2007. In his notice of mandatory appeal, Lewis raised the following three issues:

1. Whether the Court erred in admitting, over defense objection, testimony from the complaining witness regarding the issue of the defendant pointing a gun at him from 7 or 8 feet away;
2. Whether the Court erred in denying the defense request for immunity of a witness/co-defendant thereby preventing the defense from presenting exculpatory evidence; and

3. Whether the Court erred in imposing an extended term of imprisonment pursuant to N.H. Rev. Stat. Ann. 651:2 II-g.

Lewis's appellate counsel briefed only the second issue, regarding the State's refusal to grant immunity to a witness Lewis wanted to call at trial.

On July 14, 2009, the NHSC issued an order affirming Lewis's conviction. See State v. Lewis, No. 2007-0790 (N.H. Sup. Ct. July 14, 2009). The only issue addressed in the order was the immunity issue; the order made neither mention of nor reference to either of the other two claims raised in the notice of mandatory appeal.

Lewis filed a motion for a new trial in the Carroll County Superior Court ("CCSC") on September 29, 2009. In that motion, and citing the Sixth and Fourteenth Amendment and the New Hampshire Constitution, Lewis raised the following issues:

1. Lewis's trial counsel provided him with ineffective assistance of counsel on the following bases:
 - a. post-trial juror comments indicated that some jurors believed that Lewis's attorney "did not do well" or was "unprepared";
 - b. trial counsel failed to timely seek immunity for a defense witness, resulting in the denial of the motion as untimely and the deprivation of that witness' testimony at trial;
 - c. trial counsel failed to obtain and call a firearms expert at trial despite Lewis's request that he obtain such an expert, preventing Lewis from introducing evidence at trial regarding the muzzle

burn on Blasi's abdomen to support Lewis's self-defense claim;

d. trial counsel did not advise Lewis that he had received a maximum sentence except for the two years suspended off of his minimum sentence, and incorrectly advised Lewis that if he appealed his sentence to the Sentence Review Committee his sentence could be increased, causing Lewis not to seek review of his excessive sentence; and

e. trial counsel failed to properly object to Blasi's trial testimony that varied from Blasi's pretrial statement, and thus failed to preserve the issue for appeal.

2. The prosecuting attorney engaged in prosecutorial misconduct by:

a. failing to disclose exculpatory and material evidence that she was obligated to disclose under Brady v. Maryland, 373 U.S. 83 (1963), and State v. Laurie, 139 N.H. 325, 653 A.2d 549 (1995), when Blasi materially changed his testimony three days before trial began and the prosecutor did not advise Lewis or his attorney of that change prior to Blasi's trial testimony;

b. allowing and not correcting Blasi's false testimony regarding a material fact, thereby suborning perjury, when Blasi testified that he was taking morphine at the time of the August interview when, in fact, medical records in discovery had alerted the prosecutor to the fact that Blasi had stopped taking morphine six days before that interview;

c. granting immunity to Eric Harris, a witness who made multiple false and conflicting statements prior to and at trial; and

d. failing to charge Eric Harris with a crime for making false statements to the police.

The CCSC judge hearing Lewis's motion for a new trial denied the motion on December 11, 2009, in a written order. See

State v. Lewis, No. 06-S-392 (Carroll Cnty. Super. Ct. Dec. 10, 2009). In that order, the court stated that after reviewing the pleadings, arguments, and the record in the case, including the trial transcript, "[t]he record does not show that justice has not been done, and does not show that a further trial would be equitable. Mr. Lewis' [sic] motion for new trial is denied."

Id. The court referred to this summary determination as "sufficient" and stated that it "constitutes the court's ruling on the pending motion for new trial." Id. The court then went on to discuss the merits of the issues raised in the motion, "for the sake of completeness and clarity." Id.

The CCSC, addressing the claim regarding the failure of the prosecutor to disclose the change in Blasi's statements prior to trial, found that because Lewis raised the issue in his direct appeal, even though the NHSC did not address the issue, he was not entitled to reassert the issue in a collateral attack on his conviction. The court, however, went on to discuss the merits of that claim.

The court found that the discrepancy in Blasi's testimony was presented to the jury during cross-examination, and that the jury therefore possessed the impeachment evidence with which Lewis was concerned, and could use it to evaluate Blasi's credibility. Id. The court also found that the issue of Blasi's medications was "explored at trial," and that the

prosecutor's allowing Blasi to testify about being on morphine did not prejudice Lewis. Id. The court then determined that the medication issue, if handled differently at trial, would not have made a difference in the outcome of the case. Upon concluding that the prosecutor did not commit misconduct, and that defense counsel's trial performance was not constitutionally deficient, the CCSC denied Lewis's motion. Id.

Lewis filed a notice of discretionary appeal in the NHSC on January 6, 2010, raising the following three issues:

1. Whether the CCSC erred in denying Lewis's motion for a new trial due to prosecutorial misconduct by ruling that the defendant raised the issue of the victim's changed statement on direct appeal, and therefore, Lewis was barred from collaterally attacking his conviction regarding that statement;

2. Whether the CCSC erred in denying Lewis's motion for new trial by ruling that the discrepancy in Blasi's statements was raised at trial and brought to the attention of the jury on cross-examination; and

3. Whether the CCSC erred in denying Lewis's motion for new trial by finding that the prosecutor's permitting Blasi to testify to different information than was in the discovery regarding his medications in August 2007, did not impact the outcome of the trial to Lewis's detriment.

The NHSC declined the appeal on February 17, 2010. See State v. Lewis, No. 2010-0011 (N.H. Sup. Ct. Feb. 17, 2010).

Lewis then filed his petition for a writ of habeas corpus in this court, raising the following issues, as identified in this court's August 20, 2010, order to amend (doc. no. 3):

1. The prosecutor's failure to disclose prior to trial Blasi's changed description of the shooting violated Lewis's rights to due process and a fair trial under the Fourteenth Amendment, as set forth in Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

2. The prosecution engaged in misconduct, in violation of Lewis's rights to due process and a fair trial under the Fourteenth Amendment, by allowing Blasi to commit perjury at trial regarding his medicated status.

Standard of Review

Respondent has moved for summary judgment on the claims in the petition. Summary judgment may be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

Neither party here contends that an evidentiary hearing is necessary to resolve any dispute in the facts of the case; the relevant facts are available in the record. The matter therefore may be resolved on the papers.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") sets forth the appropriate standard of review, to the extent that the state courts previously ruled on the merits of Lewis's claims. See 28 U.S.C. § 2254(d); Dugas v. Coplan, 506 F.3d 1, 6-7 (1st Cir. 2007) (federal review of habeas petitions normally governed by § 2254(d) where claim was adjudicated on merits in state court). As discussed herein, the claims raised by Lewis

were adjudicated on the merits in the state courts, and therefore, the review in this case is governed by AEDPA.

I. AEDPA Standard

The Supreme Court has summarized the AEDPA standard as follows:

[A] federal court may not grant habeas relief on any claim that was adjudicated on the merits in State court proceedings unless the adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Cullen v. Pinholster, ___ U.S. ___, ___, 131 S. Ct. 1388, 1414 (2011) (internal quotations omitted) (citing Harrington v. Richter, 562 U.S. ___, ___, 131 S. Ct. 770, 787 (2011), and § 2254(d)). AEDPA “‘imposes a highly deferential standard for evaluating state-court rulings’ and ‘demands that state-court decisions be given the benefit of the doubt.’” Felkner v. Jackson, ___ U.S. ___, ___, 131 S. Ct. 1305, 1307 (2011) (quoting Renico v. Lett, 559 U.S. ___, ___, 130 S. Ct. 1855, 1862 (2010)). This standard is difficult for a petitioner to meet “because it was meant to be” difficult. Harrington, 131 S. Ct. at 786; see Jewett v. Brady, 634 F.3d 67, 75-76 (1st Cir. 2011).

[AEDPA] reserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no further. Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.

Id. (internal quotation marks and citation omitted).

II. Petitioner's Burden

Under AEDPA, a federal habeas petitioner bears the burden of demonstrating that the challenged state court resolution of the federal constitutional issues presented in the petition "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," see 28 U.S.C. § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," see 28 U.S.C. § 2254(d)(2). The Supreme Court has explained the distinction between decisions that are "contrary to" clearly established federal law, and those that involve an "unreasonable application" of that law:

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.

Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). To demonstrate that a state court's application of federal law was "unreasonable," petitioner must do more than show that the state court's application of the law was "incorrect." See id. at 410-11. Instead, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington, 131 S. Ct. at 786 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

Similarly, federal courts may not grant an application for a writ of habeas corpus "based on a claim already adjudicated on the merits in state court unless that adjudication 'resulted in a decision that as based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Wood v. Allen, ___ U.S. ___, ___, 130 S. Ct. 841, 845 (2010) (quoting § 2254(e)(1)). This court must presume that a state court's determination of a factual issue is correct. See id. "[T]he petitioner shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Id.

Discussion

I. "Brady" Claim - Claim 1

As discussed above, AEDPA applies to any claim "adjudicated on the merits" by a state court. See 28 U.S.C. § 2254. If the Brady claim here was adjudicated on the merits in the state court, and is therefore reviewable under the AEDPA standard, this court should examine "the last reasoned state court decision," on the claim, which is the "relevant state court determination for purposes of AEDPA review." See Ylst v. Nunnemaker, 501 U.S. 797, 804-06 (1991). Here, the last court to issue a reasoned state court decision on Lewis's claim was the CCSC ruling on Lewis's motion for a new trial. This court must determine, therefore, whether the state court's decision on Lewis's Brady claim "was contrary to, or involved an unreasonable application of, Federal law, as established by the Supreme Court . . . or was based on an unreasonable determination of the facts in light of the evidence" before the state court. See 28 U.S.C. § 2254(d)(1) & (2). If the state court decision on a claim did not unreasonably apply federal law or unreasonably determine the facts, this court must defer to the state court's factual and legal rulings, and must deny the petition. See Cullen, 131 S. Ct. at 1398.

The CCSC's order denying Lewis's motion for new trial initially announced that its ruling would be a summary denial, indicating that the motion had been considered on the merits, the trial record had been reviewed, and the court had found that no new trial was warranted. See State v. Lewis, No. 06-S-392 at 2-3. The court went on, however, to further find that Lewis's claim was likely procedurally defaulted because he had raised, but not briefed, a challenge to the admission of Blasi's statement in his direct appeal. Finally, the court considered the Brady claim on its merits, and determined that, on the merits, Lewis was not entitled to relief on his Brady claim.

Because the state court considered and adjudicated Blasi's Brady claim on its merits, this court reviews that ruling to determine whether the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Cullen, 131 S. Ct. at 1414 (citing 28 U.S.C. § 2254(d)). The court will give appropriate deference to the state court, giving the state court decision the benefit of any doubt. See Felkner, 131 S. Ct. at 1307.

[W]hen the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in

violation of the Fourteenth Amendment. . . .

[E]vidence is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

Cone v. Bell, ___ U.S. ___, 129 S. Ct. 1769, 1782 (2009) (citing cases including Brady, 373 U.S. at 87, and United States v. Bagley, 473 U.S. 667, 682 (1985), and quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)). To establish prejudice under Brady, Lewis must demonstrate that there was a "reasonable probability that the result of the trial would have been different if the suppressed [statement] had been disclosed to the defense."
Strickler v. Greene, 527 U.S. 263, 290 (1990) (internal quotation marks and citation omitted).

A defendant must show that learning the information altered the subsequent defense strategy, and that given a more timely disclosure, a more effective strategy would likely have resulted. It is not enough . . . merely to assert that he would have conducted cross-examination somewhat differently. At the very least, he needs to show that a plausible strategic option was foreclosed by the delay. The impact of the delayed disclosure turns, in part, on the extent [to which] the defendant actually managed to use the disclosed matter despite the delay.

United States v. Bender, 304 F.3d 161, 164-65 (1st Cir. 2002) (internal citations, quotations, and other punctuation omitted).¹

¹AEDPA requires that the relevant legal rule be clearly established in a holding of the Supreme Court, and not in dictum

Impeachment evidence that “‘is cumulative or collateral’” does not satisfy the Brady materiality requirement, because such cumulative or collateral evidence would necessarily fail to “‘create a reasonable doubt that does not otherwise exist.’”

United States v. Astacio-Espino, ___ F. Supp. 2d ___, ___, 2011 WL 1752181, *2 (D.P.R. May 9, 2011) (quoting United States v. Dumas, 207 F.3d 11, 16 (2000) (internal citation omitted)).

The CCSC, in its order denying Lewis a new trial, found that because “the discrepancy in the victim’s statements was brought to the attention of the jury on cross-examination” the proceedings, including the verdict, were not prejudiced by the prosecutor’s failure to provide the statement to Lewis prior to trial. See State v. Lewis, No. 06-S-392 at 203. The relevant state court factual findings that the suppressed statement was introduced and explored on cross examination, which underlay the court’s finding that there was no prejudice to Lewis, are presumed to be correct. See 28 U.S.C. § 2254(e)(1) (“a determination of a factual issue made by a State court shall be

or lower federal court holdings. See Williams, 529 U.S. at 412. Other federal court decisions may be relevant to determine reasonableness, however, “to the extent that inferior federal courts have decided factually similar cases,” and therefore “reference to those decisions is appropriate in assessing the reasonableness vel non of the state court’s treatment of the contested issue.” Ouber v. Guarino, 293 F.3d 19, 26 (1st Cir. 2002) (internal quotation marks and citation omitted).

presumed to be correct," unless rebutted by "clear and convincing evidence").

Petitioner has not sought to challenge the finding that the suppressed statement was explored on cross examination of Blasi. As to the question of prejudice, however, petitioner argues that, with advance notice of the change in Blasi's statement, he could have obtained a firearms expert to testify that the burn on Blasi's abdomen was caused by skin contact with the muzzle at the time the gun was fired. Such evidence, if admitted, Lewis claims would controvert Blasi's new testimony regarding the distance between Lewis and Blasi at the time of the shooting, and, therefore, Blasi's credibility. Lewis also claims that such expert testimony would support Lewis's claim of self-defense, in that it would tend to demonstrate that Lewis did not shoot his gun until Blasi was right on top of him, rather than eight to ten feet away. Excepting Lewis's assertion of his personal belief, however, as to what a firearms expert would say about the burn on Blasi's abdomen, nothing in the record before the court indicates that any expert has actually offered that opinion, or that Lewis has ever contacted an expert to discuss the issue. To the contrary, Lewis, in his motion for new trial, claimed, in part, that his attorney was ineffective because he

failed to retain a firearms expert.² Lewis's belief that an earlier disclosure of Blasi's changed statement would have resulted in Lewis being able to obtain expert firearms testimony, and that such testimony would be helpful, is merely speculative.

Further, the court notes that Dr. Johnson testified regarding the cause of the burn. Dr. Johnson testified that while he was not a firearms expert, and could not determine definitively whether or not the muzzle burn on Blasi's abdomen was caused by actual contact with a gun, based on his observations, the burn mark on Blasi's abdomen was consistent with that scenario. Lewis's attorney, in his closing argument, reminded the jury of the muzzle burn evidence and argued that it was caused by direct contact between the gun and Blasi's skin. Therefore, even if the court were to find that calling a firearms expert to explain the muzzle burn was "a plausible strategic option," Bender, 304 F.3d at 165, foreclosed by the failure of the prosecutor to timely provide Lewis with notice of Blasi's changed statement, nothing in the record would allow the court to find that a firearms expert would have been able to provide a more definitive explanation regarding the muzzle burn

²The ineffective assistance of counsel claim is not raised in the habeas petition before this court.

mark, or an explanation more favorable to the defense, than Dr. Johnson.

As stated above, and as established by the Supreme Court, prejudice is a necessary showing for a successful Brady claim. See Cone, 129 U.S. at 87; Youngblood v. West Virginia, 547 U.S. 867, 870 (2006). The CCSC found that no prejudice ensued from the late disclosure of the change in Blasi's testimony. Therefore, unless the CCSC's decision evinced "an unreasonable application of established Federal law, as determined by the Supreme Court of the United States," see 28 U.S.C. § 2254(d)(1), the CCSC's legal conclusion on the Brady question is entitled to deference, and the claim will not be further reviewed by this court. See 28 U.S.C. § 2254(d) (habeas petition "shall not be granted" with respect to a claim adjudicated on the merits if §§ 2254(d)(1) and (2) do not apply). The petitioner has not cited any Supreme Court precedent that was either unreasonably applied by the state court or contrary to the state court's decision in this case. Accordingly, this court finds that petitioner is not entitled to relief on the Brady claim in the petition, and the court should grant the motion for summary judgment on that claim.

II. Prosecutorial Misconduct

Lewis charges that his Fourteenth Amendment due process rights were violated by the misconduct of the state prosecutor when she suborned perjury by failing to correct Blasi's false testimony that he was taking morphine at the time of the August interview. Lewis asserts that Blasi's medical records, in the possession of the state and provided to Lewis in discovery, show that Blasi had been taken off morphine approximately six days before the interview. Lewis litigated this issue in his motion for new trial before the CCSC.

The CCSC, in ruling on Lewis's motion for a new trial, considered this claim on its merits. Accordingly, as explained above, this court must defer to the state court's decision unless it finds that § 2254(d)(1) or (2) applies.

As previously discussed, Blasi testified to different information than what he told the police in the August interview regarding the distance between himself and Lewis at the time he was shot. Blasi explained the discrepancy to the jury by stating that he was on a lot of medication - five narcotic pain killers including morphine - during the August interview, and the medication affected his memory. The gist of Lewis's claim that the prosecutor suborned perjury is that the prosecutor allowed Blasi to falsely add morphine to the list of drugs he was taking during the August interview in order to bolster his

credibility and help explain why his testimony had changed. Lewis claims the prosecutor allowed the false testimony to come in without correction because it helped to defeat Lewis's self-defense claim.

The CCSC's findings with respect to the medication testimony were that the issue was "explored at trial," and that "a review of the record does not disclose that this issue, if handled differently at trial, would have made a difference in the outcome of the case." See State v. Lewis, 06-S-392 at 4. While state court findings of fact are entitled to a high degree of deference upon review, and are presumed to be correct, petitioner may rebut this presumption by "clear and convincing evidence." Schriro v. Landrigan, 550 U.S. 465, 473-74 (2007).

Lewis asserts here, and the trial record confirms, that neither his attorney nor the prosecutor challenged or corrected Blasi's testimony regarding morphine, despite the fact that the testimony conflicted with medical records in the possession of both parties. If the CCSC intended in making the statement that the evidence was "explored at trial," to indicate that it was the subject of cross-examination, the CCSC is incorrect. The CCSC's factual finding, however, was not specific as to what constituted "explor[ation] at trial" regarding the morphine evidence.

The evidence before the CCSC was that Blasi testified that he was taking morphine and four other narcotics at the time of the August interview. Lewis presented the CCSC with a medical record that indicated Blasi had in fact stopped taking morphine, but not the other narcotics, six days before the August interview. The court, with that information, determined that, had the matter been "handled differently at trial," - presumably meaning if the inaccuracy in Blasi's testimony regarding his narcotic intake had been brought to the attention of the jury - there would have been no difference in the outcome of the case.

Lewis's showing in this regard, however, does not constitute clear and convincing evidence sufficient to undermine the factual finding that the issue was "explored at trial"; the trial transcripts reveal that Blasi was taking a large amount of narcotic pain medication at the time of his August interview, and the court properly characterized the existence of that evidence as an "explor[ation]" of the impact of medication on Blasi's credibility. The jury would have had that information available to it in evaluating Blasi's credibility.

Presuming the facts as found by the state court are correct, the court turns to whether the state court's ultimate legal conclusion was "contrary to" or "an unreasonable application of" federal law. See 28 U.S.C. § 2254(d)(1). Lewis charges that the prosecutor suborned perjury by failing to

correct Blasi's testimony that she knew to be false. The knowing use of perjured testimony by a prosecutor to obtain a conviction renders that conviction "fundamentally unfair." Perkins v. Russo, 586 F.3d 115, 119 (1st Cir. 2009) (quoting United States v. Agurs, 427 U.S. 97, 103 (1976)). Such a conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id.

As discussed above, the state court found that no prejudice to Lewis ensued from the admission in evidence of the morphine testimony. This court concurs in that finding; it was reasonable for the court to find that the exclusion of morphine from the list of narcotics Blasi was taking would not have impacted the jury's determination of the credibility of his testimony, in a manner likely to alter the verdict in the case.

The state court, while not explicitly citing federal law, appropriately examined whether the inclusion of the morphine testimony would have affected the outcome of the trial. See Early v. Packer, 537 U.S. 3, 8 (2002) (state court need not rely upon or cite Supreme Court precedent in order to resolve petitioner's claim as long as the court's reasoning is in accord with the law established by the Supreme Court). The state court's determination of the issue was not, therefore, "contrary to, or an unreasonable application of Federal law, as

established by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Nor was it "based on an unreasonable determination of the facts." Id. § 2254(d)(2). Accordingly, the claim in the petition alleging a due process violation arising out of prosecutorial misconduct for suborning perjury should be denied, and the court should grant the respondent's motion for summary judgment on that claim.

III. Certificate of Appealability

The § 2254 Rules require the district court to "issue or deny a certificate of appealability when it enters a final order adverse to the party." § 2254 Rule 11(a). The court will issue the certificate "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner has failed to make such a showing. Accordingly, the court should deny a certificate of appealability if it approves this Report and Recommendation and denies the petition.

Conclusion

For the foregoing reasons, the court finds that petitioner has failed to demonstrate that he is entitled to a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court recommends that the motion for summary judgment (doc. no. 11) be GRANTED, and that the amended petition for a writ of habeas

corpus (doc. no. 6) be DENIED. Should the court adopt this recommendation, the court should also deny a certificate of appealability.

Any objections to this Report and Recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file objections within the specified time waives the right to appeal the district court's order. See Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010); United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008).

A handwritten signature in black ink, appearing to be 'Landya B. McCafferty', is written over a horizontal line.

Landya B. McCafferty
United States Magistrate Judge

Date: August 5, 2011

Cc: Matthew Lewis, pro se
Elizabeth C. Woodcock, Esq.

LBM:jba